No. 98-1323

Supreme
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PNEUMO ABEX CORPORATION, PA HOLDINGS CORPORATION, and THE HENLEY GROUP INC.,

Petitioners,

v.

WILLIAM F. GRUN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD H. FERRI
KELLY, OLSON, MICHOD & SIEPKER
181 West Madison
Suite 4800
Chicago, Illinois 60602
(312) 236-6700

MICHAEL M. GORDON
Counsel of Record
ROGER W. ROSENDAHL
CINDY D. SALVO
CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000

Attorneys for Respondent

Dated: March 22, 1999

151983

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

2288

QUESTIONS PRESENTED

I. Whether the Court of Appeals properly reversed the district court's dismissal of the case for want of prosecution under Federal Rule of Civil Procedure 41(b), when the Court of Appeals determined that, based on the facts presented and applicable law, such a drastic measure was not warranted.

II. Whether the Court of Appeals, on review of the district court's dismissal of the case for want of prosecution under Federal Rule of Civil Procedure 41(b), had jurisdiction to rule on interlocutory decisions previously rendered in the case.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Counterstatement of the Case	1
A. Proceedings In The District Court	2
B. The Court Of Appeals' Decision	5
Reasons for Denying the Petition	6
I. Although Petitioners Argue That The Court Of Appeals Has Narrowed The District Court's Power To Control Its Own Docket Under Rule 41(b), Petitioners Are Merely Challenging The Fact-Specific Result Reached Below	6
A. The Court Of Appeals Properly Reversed Based On Its Determination, Amply Supported By The Record, That Plaintiff's Conduct Did Not Deserve The "Harsh Sanction" Of Dismissal	7
B. The Seventh Circuit's Decision Is Consonant With The Case Law Of Other Circuits	11

Contents

Page

C. Supreme Court Review Is Not Warranted Because The Facts Presented By This Case Are Unlikely To Recur, And The Case Does Not Present The Opportunity For A Pronouncement Of General Importance 13

II. The Court Of Appeals Had Jurisdiction To Rule On The District Court's Interlocutory Denial Of Summary Judgment 14

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Ace Novelty Co. v. Gooding Amusement Co., 664 F.2d 761 (9th Cir. 1981) 5, 13

Ball v. City of Chicago, 2 F.3d 752 (7th Cir. 1993) 7, 8, 9, 10

Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987) 14

Cherry v. Brown-Frazier-Whitney, 548 F.2d 965 (D.C. Cir. 1976) 12

Dyotherm Corp. v. Turbo Mach. Co., 392 F.2d 146 (3d Cir. 1968) 11, 13

EEOC v. First Nat'l Bank of Jackson, 614 F.2d 1004 (5th Cir. 1980), *cert. denied*, 450 U.S. 917 (1981) 11

Harris v. Callwood, 844 F.2d 1254 (6th Cir. 1988) . 11

Herdrich v. Pegram, 154 F.3d 362 (7th Cir. 1998) . 15

In re Bluestone & Co., 68 F.3d 1022 (7th Cir. 1995) 6, 7

In re Grabill Corp., 983 F.2d 773 (7th Cir. 1993) .. 14

Link v. Wabash R.R. Co., 370 U.S. 626 (1962) 7, 12

Cited Authorities

	Page
Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37 (2d Cir. 1982)	12
Morris v. Morgan Stanley & Co., 942 F.2d 648 (9th Cir. 1991)	12
O'Brien v. R.J. O'Brien & Assocs., Inc., 998 F.2d 1394 (7th Cir. 1993)	15
Patterson v. Coca-Cola Bottling Co. Cairo-Sikeston, Inc., 852 F.2d 280 (7th Cir. 1988)	10
Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d 1058 (7th Cir. 1989)	10
Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974)	11, 13
Richman v. General Motors Corp., 437 F.2d 196 (1st Cir. 1971)	11, 13
Rodgers v. Curators of University of Mo., 135 F.3d 1216 (8th Cir. 1998)	11, 12
Roland v. Salem Contract Carriers, Inc., 811 F.2d 1175 (7th Cir. 1987)	10
3 Penny Theater Corp. v. Plitt Theatres, Inc., 812 F.2d 337 (7th Cir. 1987)	11
Zaddack v. A.B. Dick Co., 773 F.2d 147 (7th Cir. 1985)	11

Cited Authorities

Page

Statutes:

28 U.S.C. § 636(b)(1) 2

28 U.S.C. § 1291 14

Rules:

Federal Rule of Civil Procedure 41(b) ..... *passim*

Federal Rule of Civil Procedure 60(b) 4, 5, 8, 15

Local Rule 21(A) 4

COUNTERSTATEMENT OF THE CASE

This litigation concerns the breach of a Severance Compensation Agreement ("SCA") between plaintiff William F. Grun ("Grun") and defendant Pneumo Abex Corporation ("Pneumo Abex"). Pet. App. 1a. Grun was the President and general manager of a Pneumo Abex division headquartered in Kalamazoo, Michigan. Pet. App. 3a. In October 1987, Pneumo Abex drafted and presented the SCA to Grun, who then executed it. Pet. App. 3a, 14a. The SCA's stated purposes were to "reinforce and encourage [Grun's] continued" attention and dedication to his duties "in the potentially disturbing circumstances of a possible change in control of the Company by providing some degree of personal financial security," and to "induce [Grun] to remain in the employ of the Company." Pet. App. 3a. The SCA provided that, if Grun terminated his employment within two years of a change of ownership, he would be entitled to severance compensation if his resignation was for any one of ten "good reasons" set forth in the SCA. Those "good reasons" included the relocation of Pneumo Abex's principal executive offices in Boston, Massachusetts. Pet. App. 3a-4a.

In August 1988, defendant PA Holdings Corporation purchased Pneumo Abex. Thereafter, Pneumo Abex implemented a number of changes which affected Grun, including changes in Grun's responsibility and authority and changes to employee compensation plans. In addition, Pneumo Abex closed its principal executive offices in Boston and relocated the corporate functions that had been performed there. Pet. App. 5a. In August 1989, Grun tendered his resignation and sought his compensation under the SCA. *Id.* Defendants rejected Grun's claim, contending that Grun did not have a "good cause" under the SCA. *Id.*

A. Proceedings In The District Court

Grun filed the instant action for breach of contract on April 4, 1990. Pet. App. 6a. During an extensive pre-trial discovery period, Grun's counsel appeared at four status conferences[1], propounded and answered written discovery, filed a summary judgment motion, and completed the submission of all required pre-trial materials. *Id.* At the end of discovery, the district court referred Grun's summary judgment motion to magistrate judge Joan H. Lefkow, pursuant to 28 U.S.C. § 636(b)(1). *Id.* The magistrate judge issued a Report and Recommendation to the district court stating that because "all the events necessary to establish Grun's right to recover [under the SCA] . . . have come to pass," Grun was entitled to compensation as a matter of law, and that his summary judgment motion should therefore be granted. Pet. App. 6a-7a.

The district court rejected the magistrate's recommendation and denied Grun's motion for summary judgment, stating that even though the "terms and meaning" of the SCA were "actually straightforward and unequivocal," Grun's entitlement to benefits for the relocation of his company's corporate headquarters was a "non sequitur indicative of a mutual mistake in the contract terms." Pet. App. 7a-8a. The district court held that "even unambiguous language can be disregarded when the parties meant something other than that which was committed to paper," *Id.*, even though no evidence had been presented to support the district court's conclusion that the parties intended something other than what was plainly written in their agreement.

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1. Defendants' counsel was absent from at least one of those conferences.

On April 1, 1993, the district court entered an order setting the trial date for September 14, 1992 (not 1993). *Id.* However, the district court failed to notify either side of the trial date. *Id.* As a result, *neither side* appeared for trial on September 14. *Id.* The following day, the district court dismissed the action due to plaintiff's "failure to appear." Pet App. 8a-9a. Notice of the dismissal order was received by defendants' counsel, but not by counsel for Grun. Pet. App. 9a. Grun's counsel thereafter continued to await notice of a trial date from the court. *Id.*

In May 1994, counsel for Grun sent defendants' counsel a change of address form. *Id.* Thus, by at least that date, defendants realized that Grun did not know that his case had been dismissed. *Id.* Defendants then "researched" the codes of professional responsibility to determine if they had an obligation to inform Grun of the dismissal notice, and decided that they did not. Pet. App. 20a, n.9. The Court of Appeals, in examining the conduct of defendants' counsel, concluded that:

> Pneumo Abex's counsel did not affirmatively "cause" the case to be dismissed, but counsel was well aware that things were amiss and chose not to fix them even though doing so would have promoted the interest of fair play. Regardless of whether an explicit rule required Pneumo Abex's counsel to alert Grun's attorney of the dismissal, the spirit of the rules required such a result.

Id.

On August 15, 1996, Grun's attorney, still under the impression that the parties were awaiting a trial date, moved

the district court to advance the case for trial. Pet. App. 20a. The court denied that motion, informing Grun's counsel for the first time that the case had been dismissed three years earlier. *Id.* Grun then moved for relief from the dismissal order under Federal Rule of Civil Procedure 60(b). In support of the motion, Grun's counsel submitted an affidavit confirming that she had never received notice of the September 14, 1993 trial date or the subsequent dismissal order. Counsel also attested that she had made numerous efforts to learn if a trial date had been set, including having clerks from her office periodically check the court files, checking the court files herself, and telephoning the court in May *1994*, at which time she was told that the case had not "come through yet" for trial, but that she would be notified when it did. *Id.*

The district court denied Grun's Rule 60(b) motion, criticizing Grun's attorney for waiting "three years" to bring it. *Id.* The court ignored that Grun's counsel had made the motion as soon as she learned of the September 15, 1993 dismissal order.

The district court also found, alternatively, that "the dismissal order was void *ab initio*," and that "thus, the case is *technically pending*." Pet. App. 39a (emphasis added). Concluding that Grun had constructive notice of the long-passed trial date and the court's clerical error, the district court, in the alternative, dismissed the case for want of prosecution pursuant to Federal Rule of Civil Procedure 41(b) and Local Rule 21(A). Pet. App. 39a.

Grun appealed to the Seventh Circuit Court of Appeals, challenging: (1) the district court's denial of his summary judgment motion; (2) the court's denial of his Rule 60(b)

motion; and (3) the district court's dismissal for failure to prosecute under Rule 41(b). Pet. App. 11a. The Court of Appeals reversed all three rulings of the district court.

B. The Court of Appeals' Decision

The Court of Appeals held that the "terms and meaning" of the SCA were "straightforward and unequivocal." Pet. App. 14a. It therefore remanded the case and directed the district court to enter summary judgment in favor of Grun and to determine the amount of compensation Grun is entitled to under the SCA.

The Court of Appeals reversed the denial of Grun's Rule 60(b) motion, holding that the district court's original dismissal order denied Grun due process. Pet. App. 25a. In so ruling, the Court of Appeals rejected the district court's finding that Grun had "constructive notice" of the trial date. The Court of Appeals recognized that it is "certainly not unusual for a litigant to hear nothing from the courthouse for a period of five months." Pet. App. 24a. The Court of Appeals also ruled that once litigants have indicated their readiness for trial, they are not obligated to take further affirmative action pending notification of the trial date, citing *Ace Novelty Co. v. Gooding Amusement Co.*, 664 F.2d 761, 762-63 (9th Cir. 1981). Pet. App. 26a.

As to the district court's alternative ruling dismissing the case for want of prosecution, the Court of Appeals ruled that dismissal was too drastic a measure based on the facts presented. The Court of Appeals correctly articulated the applicable standard, which permits Rule 41(b) dismissal "only in extreme situations where there is a clear record of delay or contumacious conduct, or when other less drastic sanctions

have proven unavailable." *Id.* Applying that standard, the Court of Appeals found that the "record is barren of any suggestion whatsoever that Grun was dilatory prior to the September 14, 1993 dismissal." Pet. App. 24a. The Court of Appeals also ruled that dismissal was not appropriate because the district court issued no warning and

> dismissals without warning are appropriate in only the most extreme cases, where it is clear that counsel must have *expected* his actions (or inaction) to be answered with dismissal.

Pet. App. 26a, citing *In re Bluestone & Co.*, 68 F.3d 1022, 1026 (7th Cir. 1995) (emphasis in original).

REASONS FOR DENYING THE PETITION

I.

ALTHOUGH PETITIONERS ARGUE THAT THE COURT OF APPEALS HAS NARROWED THE DISTRICT COURT'S POWER TO CONTROL ITS OWN DOCKET UNDER RULE 41(b), PETITIONERS ARE MERELY CHALLENGING THE FACT-SPECIFIC RESULT REACHED BELOW

According to petitioners, the Seventh Circuit's decision proclaims that district courts have "no power" to dismiss a case for want of prosecution, eliminates a district court's inherent ability to control its own docket, and "seriously erodes the power of our district courts to secure the 'just, speedy, and inexpensive determination of every action.' " Pet. 2-3. In actuality, the Court of Appeals merely found that the district court had abused its discretion based on the facts

presented. There is no dispute as to the applicable law. Thus, the Court of Appeals' decision presents no issue appropriate for Supreme Court review.

A. The Court Of Appeals Properly Reversed Based On Its Determination, Amply Supported By The Record, That Plaintiff's Conduct Did Not Deserve The "Harsh Sanction" Of Dismissal

Rule 41(b) permits a defendant to move for a case's dismissal due to a plaintiff's " 'failure . . . to prosecute or to comply with . . . [the] rules or any order of court.' " Fed. R. Civ. P. 41(b). Courts also have the inherent power to raise the issue of involuntary dismissal *sua sponte*. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962). In determining the propriety of a Rule 41(b) dismissal, the district court must carefully examine all the attendant facts, always bearing in mind that dismissal is a drastic remedy which violates the public policy of affording all litigants their day in court. Dismissal is appropriate " 'only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailable.' " *In re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995) (citation omitted). In *Ball v. City of Chicago*, 2 F.3d 752 (7th Cir. 1993), the Seventh Circuit adopted guidelines to aid the district courts in determining if a Rule 41(b) dismissal is warranted:

> [T]he decision . . . should . . . take full and careful account of the frequency and magnitude of the plaintiff's failures to comply with deadlines for the prosecution of the suit, the apportionment of responsibility for those failures between the plaintiff and his counsel and therefore the

> appropriateness of sanctioning the plaintiff's lawyer rather than the plaintiff, the effect of the failures in taxing the judge's time and disrupting the judge's calendar to the prejudice of other litigants, the prejudice if any to the defendant from the plaintiff's dilatory conduct, [and] the probable merits of the suit. . . . [In addition], there must be an explicit warning before the case is dismissed.

Id. at 759-60.

Here, the district court plainly did not properly evaluate the factors enumerated in *Ball*. First, as to the "frequency and magnitude" of plaintiff's failure to comply with deadlines, the district court based its original decision to dismiss solely on Grun's failure to appear for trial on September 14, 1993. As the Court of Appeals recognized, this was an especially improvident exercise of the district court's discretion because, due to courthouse error, *neither plaintiff nor defendants received notice of the trial date*. *See* Pet. App. 22a-23a. The district court punished Grun for having missed a trial date which he justifiably knew nothing about, and which defendants also missed. Furthermore, prior to September 14, 1993, Grun at all times acted diligently in prosecuting his case. Grun's counsel attended four status conferences, participated in discovery, filed a summary judgment motion, and completed the submission of all required pre-trial materials. Grun's counsel also filed the Rule 60(b) motion within days of learning that the case had been dismissed. *See* Pet. App. 24a.

The second *Ball* factor — apportionment of responsibility for any failures as between plaintiff and his counsel — also strongly militates against dismissal. Grun is blameless.

Furthermore, Pneumo Abex's counsel is conspicuously silent as to *its own* conduct. In its decision, however, the Court of Appeals expressly noted that eight months after the district court dismissed the case for plaintiff's failure to appear, "Grun sent a change of address form to defense counsel, who chose not to inform Grun that the case had been dismissed." Pet. App. 19a-20a. The Court of Appeals concluded that:

> Pneumo Abex's counsel did not affirmatively "cause" the case to be dismissed, but counsel was well aware that things were amiss and chose not to fix them even though doing so would have promoted the interest of fair play. Regardless of whether an explicit rule required Pneumo Abex's counsel to alert Grun's attorney of the dismissal, the spirit of the rules required such a result.

Pet. App. 20a n.9. In such circumstances, Pneumo Abex's claim that the Court of Appeals' decision has "serious implications for the administration of justice" because it purportedly "excuses a plaintiff's sustained neglect" of his lawsuit is grandiose nonsense.

The third *Ball* factor is the effect of the failures in taxing the district court's time and disrupting the judge's calendar. Here, Grun and his counsel met every applicable deadline and attended every status conference (which cannot be said of Pneumo Abex's counsel). Plaintiff's only "transgression" was his failure to appear for a trial that the district court failed to tell him had been scheduled. Defendants were equally culpable, since they too failed to appear.

The fourth factor, any prejudice to defendant, should not be a consideration here. Pneumo Abex knew by May 1994,

when its counsel received plaintiff's change of address form, that Grun was unaware of the September 1993 dismissal order. Yet as the Court of Appeals recognized, Pneumo Abex's counsel violated the spirit of the Rules of Professional Conduct by failing to alert Grun's attorney of the dismissal. Pneumo Abex should not now be heard to complain about prejudice when its own counsel "was well aware that things were amiss and chose not to fix them." Pet. App. 20a n.9.

The fifth *Ball* factor is "the probable merits of the suit." Here, the action is unquestionably meritorious. Indeed, the Court of Appeals has directed the district court to enter summary judgment for Grun. Finally, while *Ball* requires "an explicit warning before the case is dismissed," 2 F.3d at 760, the district court issued no warning at all to Grun or his counsel prior to dismissing the case *sua sponte*. In sum, the district court's dismissal was unreasonably harsh and violated the spirit of rules designed to allow courts to clear their dockets of cases in which a contumacious plaintiff willfully refuses to propel a case toward trial.

The Court of Appeals' decision also is entirely consistent with Seventh Circuit precedent, which has consistently held that Rule 41(b) dismissals should be employed only "in extreme situations when there is a clear record of delay or contumacious conduct." *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1061 (7th Cir. 1989) (citations omitted). *See also Patterson v. Coca-Cola Bottling Co. Cairo-Sikeston, Inc.*, 852 F.2d 280 (7th Cir. 1988) (affirming dismissal of case where plaintiff, over a four-and-a-half year period, repeatedly failed to retain an expert witness); *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175 (7th Cir. 1987) (dismissal of plaintiff's case was not an abuse of discretion where plaintiffs willfully and repeatedly failed to

respond to court orders and ignored defendant's three motions to dismiss); *3 Penny Theater Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337 (7th Cir. 1987) (affirming dismissal due to plaintiff's failure to attend three status conferences, failure to submit a draft of a protective order to the court, and refusal to produce documents to defendants); *Zaddack v. A.B. Dick Co.*, 773 F.2d 147 (7th Cir. 1985) (affirming dismissal where plaintiff's counsel requested additional discovery time on three separate occasions, substituted counsel two times, and three times failed to attend status conferences).

B. The Seventh Circuit's Decision Is Consonant With The Case Law Of Other Circuits

The Court of Appeals' decision is also in accord with the Rule 41(b) decisions of other Circuits. Indeed, the Circuits are unanimous that dismissal is a harsh sanction to be exercised only in the most egregious situations. *See, e.g., Richman v. General Motors Corp.*, 437 F.2d 196, 200 (1st Cir. 1971) (" 'The judge must be ever mindful that the policy of the law favors the hearing of a litigant's claim upon the merits' ") (citation omitted); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) ("[D]ismissal 'must be tempered by a careful exercise of judicial discretion' ") (citations omitted); *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988) ("dismissal applies only in 'extreme situations' of deliberate delay or 'contumacious conduct' ") (citation omitted); *Dyotherm Corp. v. Turbo Mach. Co.*, 392 F.2d 146, 148-49 (3d Cir. 1968) ("Dismissal is a harsh sanction which should be resorted to only in extreme cases."); *EEOC v. First Nat'l Bank of Jackson*, 614 F.2d 1004, 1007 (5th Cir. 1980) (dismissal is a "sanction of last resort, applicable only in extreme circumstances"), *cert. denied*, 450 U.S. 917 (1981); *Rodgers v. Curators of University of Mo.*, 135 F.3d 1216,

1219 (8th Cir. 1998) ("[T]he particular circumstances of the case . . . [must be] sufficient to justify the harsh consequences of forever denying litigant his day in court").

Despite the ample case law to the contrary, petitioners claim that the Court of Appeals' decision "contradicts the prior decisions [of the Supreme Court] and numerous courts of appeals," and proceed to cite four decisions from other circuits which purportedly "upheld discretionary dismissals in the face of similar inactivity." Pet. 3. However, none of the cited cases are apposite. In *Link*, 370 U.S. 626, which the Court of Appeals specifically noted is "totally distinguishable" (Pet. App. 23a), the plaintiff exhibited a continuing pattern of dilatory behavior. That behavior included vacating trial dates, repeated requests for extensions of time, and failure to appear at a pre-trial conference for which counsel received adequate notice. *Id.* at 633-36. In *Morris v. Morgan Stanley & Co.*, 942 F.2d 648 (9th Cir. 1991), appellants had

> repeatedly failed to respond to correspondence from Appellees regarding discovery and . . . failed to appear at at least one scheduled meeting, and misrepresented their intentions to the district court during five separate status conferences. . . . [Appellants also] have substituted counsel four times.

Id. at 652. In *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37 (2d Cir. 1982), the court had warned plaintiff of the possibility of dismissal at least four times over a seven-year period. Finally, in *Cherry v. Brown-Frazier-Whitney*, 548 F.2d 965 (D.C. Cir. 1976), the plaintiffs repeatedly moved for extensions and then deliberately ignored two letters from the judge requesting advice as to plaintiffs' readiness for trial.

C. Supreme Court Review Is Not Warranted Because The Facts Presented By This Case Are Unlikely To Recur, And The Case Does Not Present The Opportunity For A Pronouncement Of General Importance

In determining whether to dismiss under Rule 41(b), the facts of the case are of paramount importance. *Ace Novelty Co.*, 664 F.2d at 763. *See Reizakis*, 490 F.2d at 1135 ("[T]he propriety of dismissal ultimately turns on the facts of each case"); *Dyotherm Corp.*, 392 F.2d at 148 (in determining whether dismissal is appropriate, "all the pertinent circumstances must be considered"); *Richman*, 437 F.2d at 199 (" '[N]o precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute but the procedural history of each case must be examined in order to make such determination' ") (citations omitted). Here, the Court of Appeals' decision sets forth the facts in detail and analyzes them at length. Those facts are unusual and unlikely to recur. It is the rare situation where the district court fails to notify the parties of a trial date, and then dismisses the case *sua sponte* when *none* of the parties appear. It is even more unusual when, subsequent to the dismissal, the defendant's counsel chooses to remain silent despite his knowledge that plaintiff is unaware of the dismissal order.

While the facts of this case are unusual, the principle of law applied to those facts by the Court of Appeals is well-established and not the subject of disagreement among the Circuits. Thus, review of the case offers this Court no opportunity for a pronouncement of any importance, general or otherwise.

II.

THE COURT OF APPEALS HAD JURISDICTION TO RULE ON THE DISTRICT COURT'S INTERLOCUTORY DENIAL OF SUMMARY JUDGMENT

Petitioner claims that the Court of Appeals had no jurisdiction to reverse the district court's denial of plaintiff's summary judgment motion because

> when hearing an appeal from the denial of a Rule 60(b) motion, the court of appeals' jurisdiction is limited to addressing whether the denial of the motion was an abuse of discretion.

Pet. 4. Petitioner, however, overlooks that the district court, in the alternative, determined that the case was still "technically pending," and then dismissed the case for want of prosecution under Rule 41(b). Pet. App. 39a. That dismissal constituted a final judgment under 28 U.S.C. § 1291 because it "end[ed] the litigation on the merits and [left] nothing for the district court to do but execute the judgment." *See Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 666 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987).

The law is well-settled that an appeal from a final judgment draws into question all prior non-final rulings and orders. For example, in *In re Grabill Corp.*, 983 F.2d 773 (7th Cir. 1993), plaintiff law firm sought reimbursement for fees and expenses incurred in representing a bankrupt defendant. The district court ruled against the law firm, and the firm filed a motion for reconsideration, which was subsequently denied. Plaintiff then filed a notice of appeal,

which stated that plaintiff was appealing denial of the motion to reconsider. Defendant argued that the Court of Appeals could not review the original judgment, but only the motion to reconsider. The Seventh Circuit disagreed, holding that "[a]n appeal from a final judgment brings up for review by the appellate court all orders (except those that have become moot) rendered by the trial court previously in the litigation." *Id.* at 775. *See also Herdrich v. Pegram*, 154 F.3d 362, 368 (7th Cir. 1998) ("[A]n order which is not a final judgment when entered becomes final or appealable upon the entry of a final judgment. The appeal of this judgment renews all issues previously pleaded and resolved by the trial court in litigation."); *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1397 n.1 (7th Cir. 1993) (holding that a denial of a motion to set aside a default judgment was final and thus brought up for appellate court review " 'all orders . . . rendered by the trial court previously in the litigation' ") (citation omitted).

Petitioners' argument that review of a Rule 60(b) motion does not bring up decisions previously rendered in the litigation misses the point. The district court's dismissal for want of prosecution *under Rule 41(b)* constituted a final judgment. The Court of Appeals accordingly had jurisdiction to reverse the district court's interlocutory order denying plaintiff's motion for summary judgment.

The procedural posture of this case — in which the district court both denied a Rule 60(b) motion and dismissed the case for want of prosecution — is unusual. However, because the applicable principle of law is well-settled, this case is not appropriate for Supreme Court supervision or review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL M. GORDON
Counsel of Record
ROGER W. ROSENDAHL
CINDY D. SALVO
CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038
(212) 504-6000

RICHARD H. FERRI
KELLY, OLSON, MICHOD & SIEPKER
181 West Madison, Suite 4800
Chicago, Illinois 60602
(312) 236-6700

Attorneys for Respondent

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